Website Accessibility Lawsuits Continue to Trend Up

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In 2018, practitioners scouring nationwide federal court records identified more than 2,250 lawsuits filed alleging website inaccessibility under Titles II and III of the Americans with Disabilities Act (ADA)[1]. Last year did not show signs of slowing, as accessibility advocates filed still more cases – with a significant number filed in progressive and tech-savvy California.[2] Here is why: a claimant need not travel to bring a website lawsuit, but can do so from his or her home. And, with the exponential rise in both digital transactions and media, it's difficult to argue that websites are not a place of public accommodation. Also, while technology advances rapidly, websites meant to serve the public have not always been thoughtfully designed to ensure participation by people with disabilities. Still other websites are in between updates or redesigns. Of course, there is an economic incentive too. Federal courts regularly honor California's minimum statutory damages ($4,000 or 3x actual damages, whichever is greater, for each denial of a public accommodation) and attorneys' fees to advocates who enforce accessibility laws.

The rise in litigation should alarm all entities that must comply with the ADA – businesses of all sizes, and state and local governments. Regardless of how well-intentioned your entity may be, it may still be exposed to risk under these important civil rights laws. Thus, to avoid costly litigation, entities with websites and mobile applications should assess whether they are providing access as required by the ADA and parallel state laws. Moreover, entities should train staff in this important area and make sure website developers, vendors, and third-party sites place a priority on accessibility.

The U.S. Department of Justice (DOJ) has opined that the ADA applies to a company's website.[3] But ADA compliance has proven difficult in light of the dearth of regulatory guidance. Businesses hoped to receive guidance from long awaited DOJ regulations in 2016,[4] but were disappointed when, in 2018, the DOJ deferred the regulations to Congress. Congress has not yet addressed the issue.

Where Are We Now?

In the absence of regulations, courts have stepped in to provide guidance. But federal circuits are in conflict over whether the ADA applies to websites. The conservative minority excludes websites from coverage under Title III because it interprets a place and public accommodation as a physical space and not non-physical access.[5] The intermediate position, followed by the Ninth Circuit in its 2019 *Robles v. Domino's* decision, finds that websites must comply with the ADA only if there is a nexus between the website and access to a physical place of public accommodation.[6] The more expansive interpretation finds that Title III does not require a physical space nor nexus.[7]

The California Supreme Court has not weighed in on the subject, but at least one court has taken up the task. The Second Appellate District decided *Thurston v. Midvale* in September 2019. There, a blind user of screen reader software brought a claim alleging that a restaurant's website failed to comply with the ADA, and thus, violated the Unruh Act. According to the plaintiff, the website was noncompliant because her screen reader software could not read the menu or make reservations. Moreover, the website graphics were inadequately labeled, or not labeled at all, such that her software could not discern the information the website graphics represented. The court found that at the very minimum, Title III covers a website with a nexus to a physical place of public accommodation. And, such a nexus exists when the website allows studying the menu and making a reservation for a meal at the restaurant.

While it seems that we remain uncertain as to whether websites must comply with the ADA, *Domino's* and *Thurston* suggest that California courts will apply the ADA to websites—and online business, or mobile applications—only if the website is connected to a physical space.

How to Comply With ADA Standards

There is no one size fits all compliance standard that businesses must follow. After all, the DOJ noted that noncompliance with a "voluntary technical standard" does not necessarily mean that the business is noncompliant with the ADA.[8] A business has flexibility in how it complies with the ADA. So, a business may turn to recognized guidelines for accessibility compliance, but may not need to comply with every new version.

Web Content Accessibility Guidelines (WCAG) Levels A and AA are a gold standard for guidance in assessing accessibility.[9] WCAG (version 2.1) is currently the only guidelines accepted by the courts.[10] A business's failure to comply with WCAG does not automatically expose it to liability under the ADA. But, it will undoubtedly face litigation trying to prove that its alternative method is equally compliant. Notably, recent court decisions have upheld the WCAG compliance as an equitable remedy "if, after discovery, the website and app fail to satisfy the ADA."[11] Therefore, following WCAG 2.1 continues to be the best start towards obtaining website accessibility.

Courts have not yet found other forms of accommodations reasonable. Recently, *Thurston* rejected the possibility of listing a phone number and email address on the business website as a reasonable alternative. The court reasoned that "in order to be effective, *all* auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability."[12] A phone line that is only answered during working hours fails to provide a person with a visual impairment the same privacy and independence offered to a sighted person because he or she is reliant on another person's convenience to obtain information. An email address that directs messages to a person that cannot be available to respond 24-hours a day similarly deprives a person with a disability these privileges.

Conclusion

Ultimately, ADA compliance communicates inclusiveness and reduces your risk of litigation. Adhering to the in-depth WCAG guidelines can be daunting, but can help a business avert the burdensome costs of such lawsuits.

For further information regarding accessibilities, please contact Kurt Franklin or your Hanson Bridgett attorney.

[1] This does not count the less commonly filed state-court website cases.

[2] While the tally for 2019 is not yet completed, as of June 30th it was set to outpace 2018 for federally-filed ADA lawsuits – edging closer to 2,500.

[3] Assistant Attorney General Stephen D. Boyd, Letter to Congressman Tedd Budd, Sept. 25, 2018 (Boyd).

[4] See "Is your Online Business Accessible To Persons With Disabilities?"

[5] Ford v. Schering-Plough Corp. (3rd Cir. 1998) 145 F.3d 601.

[6] Thurston v. Midvale Corp. (2019) 39 Cal.App.5th 634 (*citing Robles v. Domino's Pizza, LLC* (9th Cir. 2019) 913 F.3d 898 (Domino's)); *National Federal for the Blind v. Target* (N.D. CA 2007) 582 F. Supp. 2d 1185.

[7]Thurston, supra, at p. 9 (collecting cases *Carparts Distribution Center. v. Automotive Wholesaler's* (1st Cir. 1994) 37 F.3d 12; *Doe v. Mutual of Omaha Ins. Co.* (7th Cir. 1999) 179 F.3d 557; *Pallozzi v. Allstate Life Ins. Co.* (2d Cir. 1999) 198 F.3d 28.)

[8] Boyd, *Supra,* at p. 2.

[9] Web Accessibility Initiative

[10] See *Domino's, supra,* 913 F.3d 898.

[11]Domino's, supra, 913 F.3d at p. 907.

[12] *Thurston, supra,* at p. 24 (emphasis added).

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